

REMARKS

Applicant respectfully requests reconsideration of the present application in view of the foregoing amendments and the following remarks.

Claims 13, 44 - 71 and 84 are requested to be cancelled. Claims 13 and 84 were cancelled because they were a duplication of existing claims. Claims 44 - 71 were cancelled in order to allow Applicant to pursue different claimed innovations without incurring additional filing fees based upon the excess claim fee previously submitted.

Claims 26 and 72 are currently being amended.

Claims 99 through 121 are being added.

This amendment adds, changes and/or deletes claims in this application. A detailed listing of all claims that are, or were, in the application, irrespective of whether the claim(s) remain under examination in the application, is presented, with an appropriate defined status identifier.

After amending the claims as set forth above, claims 1-12, 14-43, 72-83 and 85-121 are now pending in this application.

A. Obviousness Rejection – Blucher and Moyer

Claims 1-5, 7-18, 20-36, 38-43, 47-52, 59-63, 67-76, 78-89 and 91-98 have been rejected under 35 USC § 103(a) as being obvious in light of the combined teachings of US Pat. No. 4510193 to Blucher and US Pat. No. 5159718 to Moyer. This rejection and the combination of references on which the rejection is made are respectfully traversed.

Blucher discloses a method and process for manufacturing a fabric material specifically intended for use in protective clothing such as chemical warfare suits. While Blucher discloses the use of active carbon as an adsorbent mounted to a sheet of fabric, the clear teachings of this

patent are directed to protective clothing (column 1, lines 24 - 25) intended to safeguard the wearer of such a garment from *external*, harmful agents such as mustard gas and chemical warfare agents (column 5, lines 19 - 24). The entirety of the teaching of Blucher is directed to protective clothing which shields the wearer of the garment from harmful agents found external to the garment - the teaching of this patent is strictly limited to preventing the flow of harmful agents from the outside in.

Moyer discloses a garment intended to be worn while hunting which integrates a camouflage color scheme on the exterior surface thereof in combination with a highly visible orange color known as "hunter's orange".

First, applicant asserts that there is no teaching, suggestion or motivation for combining Blucher and Moyer. As noted above, Blucher is directed to a structure and means for creating a fabric used in protective clothing such as chemical warfare suits. Quite distinct from this, Moyer is directed to a garment used while hunting wild game. A careful review of the teaching of Blucher shows that it is particularly directed to clothing intended to shield the wearer from harmful external substances such as mustard gas and has no relation to garments used while hunting wild game. There is no incentive, teaching or motivation for combining these disparate references except to attempt to reach applicants claimed innovations.

1. Secondary Considerations of Non-Obviousness

Typically, an obviousness determination is conducted as a purely mental exercise based upon prior art documents and the subjective state of mind of a person skilled in the art. However, the analysis in this case is aided by a wealth of **objective** evidence of the secondary considerations of non-obviousness in view of the extended period of time since the Applicant's original priority date of November 25, 1991. Applicant has collected and submitted this evidence in related proceedings (See Reexamination Ser. No. 90/007,331) and reasserts this wealth of evidence in this case. Applicant asserts that in light of this evidence, Claims 1-5, 7-18, 20-36, 38-43, 47-52, 59-63, 67-76, 78-89 and 91-98 are not obvious in light of the combined teachings of Blucher and Moyer.

In analyzing the question of obviousness, the Federal Circuit for more than two decades has recognized the importance of objective evidence in the form of "real world experience" as applied to an obviousness determination Rosemount, Inc. v. Beckman Instruments, Inc., 221 USPQ 1, 7 (Fed. Cir. 1984). The most recent decision by the U.S. Supreme Court regarding the obviousness analysis under 35 USC § 103 has reaffirmed the importance of the secondary considerations of non-obviousness KSR International Co. v. Teleflex, Inc., 127 S. Ct. 1727, 1729-1730 (2007). Blucher and Moyer were available to those skilled in the art at the time of the Applicant's filing, yet the solution to the problem found by Applicant was not obvious to any of them. The objective evidence, composed of real world facts, merits great weight in this case. That evidence includes the filling of a long-felt need, commercial success, unexpected results, skepticism of experts, failure of others, unsolicited praise from hunters, and widespread recognition of the significance of the Applicant's solution to the problem.

The MPEP expressly instructs the Examiner to conduct a fresh review of the obviousness rejections in light of the totality of this evidence. "All of the competent rebuttal evidence taken as a whole should be weighed against the evidence supporting the *prima facie* case" In re Piasecki, 745 F.2d 1468, 1472 (Fed. Cir. 1984) as cited in MPEP § 716.01(d). Moreover, both the courts and MPEP provide clear instruction that secondary considerations of nonobviousness are often the **best evidence** to use in making this analysis.

Evidence of secondary considerations must always when present be considered in the process of determining obviousness, . . . it may often be the most probative and cogent evidence in the record. It may often establish that an invention appearing to have been obvious was not.

Fromson v. Advance Offset Plate, Inc., 225 USPQ 27, 33 (Fed. Cir. 1985).

a. Long-Felt Need

MPEP § 716.04 provides that “establishing long-felt need requires objective evidence that a recognized problem existed in the art for a long period of time without solution.” Such objective evidence includes the failures of others to solve the problem and the fact that the invention does in fact satisfy the long-felt need.

Applicant submits herewith numerous declarations of experienced hunters and innovators of scent controlling products which provide additional support. For example, as detailed in the 2007 Declaration of Jim Hill (Attachment 1) , Mr. Hill has more than 44 years of experience in hunting wildlife and more than 12 years of experience retained as a Professional Staff Hunter by manufacturers of hunting products. (Mr. Hill is retained as a Professional Staff Hunter on behalf of the Applicant.) In his Declaration, Mr. Hill reaffirms the acute sense of smell of wildlife and also reviews many unorthodox steps he has taken in the past and attempts to overcome the problems presented by human odor while hunting.

Keith Edberg is another individual with over 35 years of practical hunting experience and over 22 years of experience in the manufacturing and retail sales of odor controlling hunting products. As described more fully in Mr. Edberg’s Declaration (Attachment 2) many unsuccessful strategies and tactics have been followed prior to the Applicant’s innovations in attempts to overcome the challenges posed by many animal’s acute sense of smell.

Still more objective evidence of the long-felt need of Applicant’s innovations is found in the declarations of Kathy Etling (Attachment 3), Brad Clinton (Attachment 4), Denny Geurink (Attachment 5), James C. Hill (Attachment 6), John David Love (Attachment 7), Supplemental Jim Hill (Attachment 10) and Supplemental Edberg (Attachment 11). These declarations all attest to the long-felt need in the hunting industry for a product which will effectively combat the acute sense of smell of wildlife. Collectively, these declarations discuss the problems encountered with the prior art solutions and specifically attest to the fact that Applicant’s innovations have successfully satisfied this long-felt need in the industry.

Still further evidence of the fact that Applicant's innovations have satisfied this long-felt need are found in the comments of actual hunters using Applicant's commercial products embodying the claimed innovations. Numerous examples of testimonials are seen in Exhibit H to the Declaration of Greg Paquin (Attachment 8). Overall, these Declarations show that Applicant has clearly established evidence of long-felt need.

b. Commercial Success

The commercial success of the innovations defined in Applicant's claims pending in this Application is objectively established in this case in light of the realities of the marketplace and the astounding growth in sales of products embodying the innovations as detailed in the attached Declarations of Greg Paquin, Licensing Manager of ALS (Attachment 8), Everett Tarrell, Director of Marketing and Brand Management for Cabela's (Attachment 9) and Keith Edberg, Operations Manager of Robinson Outdoors, Inc, a licensee of ALS (Attachment 2 and Attachment 11). Prior to Applicant's introduction of its innovations, there did not exist any such odor absorbing garments for sale in the marketplace incorporating an odor absorbing agent such as activated charcoal securely mounted to the garment which was intended for use by an outdoorsman or hunter to avoid detection by wildlife using their sense of smell (Tarrell Decl., ¶ 3 & 4, Attachment 9).

Since the Applicant began commercializing and marketing odor absorbing garments intended for use by hunters and outdoorsmen in 1991, this market has grown from \$0 to approximately \$100 million (Tarrell Decl. ¶ 3-5, Attachment 9). The Paquin Declaration graphically depicts the growth in sales (Attachment 8, ¶'s 11 and 12) resulting in an annualized average growth in sales of nearly 59%. ALS has successfully licensed its innovations to 22 different entities, several of which are extremely well known, sophisticated, prominent fabric, garment or hunting product manufacturers and retailers including W.L. Gore & Associates, Inc. (manufacturers of the well known GORE-TEX brand fabric coating), Cabela's, Inc., Robinson Outdoors, Inc., Browning Arms Company, Gander Mountain Company, Bass Pro Shops, Inc., and Wolverine Worldwide, Inc. (Paquin Decl. ¶ 7, Attachment 8). The declarations and

accompanying documentation are clear, objective evidence of the astounding commercial success realized by the Applicant.

The Declarations provide other, important information in evaluating the relative success of the ALS products. Specifically, the President of the Applicant, Mr. Greg Sesselmann, started as a sole inventor who had extremely limited capital, little or no experience in manufacturing clothing products and little or no experience in the marketing and sales of hunting products. (Tarrell Decl. ¶ 7, Attachment 9). Despite these significant obstacles, Applicant was able to overcome these hurdles and create a new market for odor absorbing garments and accessories which approximates \$100 million.

Commercial success was also not the function of overwhelming advertising. In developing the market for these products, Applicant had extremely limited capital and no experience in marketing of hunting products (Tarrell Decl. ¶ 7, Attachment 9). Mr. Tarrell has been employed since 1987 by Cabela's, Inc., the third-largest hunting apparel retailer in the US and he is currently Director of Marketing and Brand Management for Cabela's. In paragraph 7 of Mr. Tarrell's Declaration, he underscores the fact that the Applicant was a "sole inventor with extremely limited capital, little or no experience in manufacturing clothing products and little or no experience in the marketing and sales of hunting products." Mr. Tarrell goes on to state that "(i)n light of the limited resources and experience in the industry possessed by Greg Sesselman, the success of ALS and the creation of the \$100 million odor absorbing garment market is that much more remarkable." Edberg mirrors the comments of Tarrell (Attachment 9) attesting to the fact that the remarkable success of Applicant is not the function of overwhelming or effective advertising (Attachment 2, ¶12). As clearly documented in these Declarations, Applicant has submitted objective evidence that Applicant's success is not a function of advertising.

There is one critically important point to note with respect to the Tarrell Declaration; Mr. Tarrell is not employed by, associated with or otherwise connected with the Applicant or Mr. Sesselmann. He has received no consideration for preparation and submission of the enclosed

Declaration. Therefore, these Declarations should be entitled to significant weight. See Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281 (Fed. Cir. 1985).

Yet another measure of commercial success of Applicant's innovation is found in the unsolicited awards that ALS has received from the industry regarding its innovative products. ALS was awarded a Buyer's Choice Gold Medal Award from Cabela's, Inc. for its odor absorbing clothing (Paquin Decl. ¶ 17, Attachment 8). This award specifically identifies Applicant's products as "perhaps the most significant break-through in the hunting garment industry in years." Scent-Lok brand clothing manufactured by Applicant was also selected as a "Best Buy Winner" for 2003 by *Inside Archery* magazine and was awarded the 2004 Reader's Choice Award by *Bow Hunting World* (Paquin Decl. ¶ 17, Attachment 8).

As described above and detailed in the Paquin, Edberg, and Tarrell declarations, Applicant has objectively established the commercial success of its products and methods of using its products and has also established a clear nexus between this success and the particularly claimed innovations. Applicant has objectively established that such success was not the result of commercial advertising and in fact, this success was surprising in view of the Applicant's limited resources and experience in the industry. Overall, Applicant has submitted overwhelming evidence documenting the direct connection between the Applicant's commercial success and the claimed innovations.

More proof is found in the Paquin Declaration which identifies that the Applicant has had licensing arrangements with over 22 different licensees including a sophisticated entities such as W.L. Gore & Associates, Inc., Cabela's, Inc., Robinson Outdoors, and Browning Arms Co., Inc. Gander Mountain. Company, Inc. Bass Pro Shops, Inc. and Wolverine Worldwide, Inc. (Paquin Declaration ¶7, Attachment 9).

Additional support is found in paragraph 13 of the Edberg Declaration which specifically states that "prior to the introduction of ALS's products, odor adsorbing garments did not exist in

the marketplace and in fact there was no marketplace for the products" (Attachment 2) (See also Attachment 11). So, prior to the Applicant's innovation, according to the Edberg Declaration, there was no market for products incorporating and utilizing Applicant's technology and methods, but since 1997 Robinson Outdoors has sold more than 400,000 garments and accessories incorporating this technology. In the 11 years in which Robinson Outdoors has been a licensee of this technology, this entity's sales have grown from zero to \$120,000,000.

c. Unexpected Results

One of the many factors considered as a secondary consideration of non-obviousness is unexpected results, and objective evidence of the unexpected results realized by consumers putting into practice Applicant's claimed innovations is found in the numerous unsolicited testimonials received by Applicant from hunters. The following are a few relevant quotes from some of these unsolicited testimonials.

- Barry Green submitted a testimonial about hunting a 468 pound wild boar and stated "he sniffed and snorted at me with his head only inches from my gun barrel. He couldn't detect any threat... we later measured the distance of his hoof print from the chair leg (I was sitting in) and it measured 2'3" [i.e., two feet, three inches]."
- "In a matter of moments, I had eight deer standing all around me from 5 yards to about 30." (Jason Quintrel)
- "Having hunted in many states and Canadian provinces I have never experienced the close encounters as I did in Wyoming this fall. . . . Having hunted whitetails for over 20 years, of course I had doubt that anything would eliminate human odor from the whitetails nose. . . . Now here's why I'm writing this story so read carefully. I now have an adult whitetail doe and two fawns nursing 3 yards down wind of me. . . . That's not all – a few minutes later I had a small 6 point whitetail

buck stick his head right through the sage that I had surrounded my blind, at a total distance of 1 foot away from my face. I couldn't believe it, all 9 of the whitetails moved downwind of me no further than 4-5 yards away and never knew I was there. . . . This story might sound incredible but it is the truth. The Scent Lok suit had to do its job." (Martin Stubstad)

- "Please allow me to introduce myself as a Wildlife Officer (Game Warden) with the Florida Game and Freshwater Fish Commission. . . . After reading articles about your "Scent Lok" clothing in several outdoor magazines, I decided to purchase a set for the upcoming doe season in Florida. I have to admit that I was somewhat skeptical about it working, but thought I would give it a try! . . . This was by far, the best archery season I have ever had. On numerous occasions I had deer directly downwind from me and 3 of the deer I killed were less than 10 yards away, downwind. It was amazing for me to see deer downwind that did not spook. I have tried odor eliminating sprays and cover scents in the past, but did not have favorable results. Your product was something else! Several times, I had deer remain downwind and feeding for over 30 minutes without picking up my scent. . . . I would like to close by saying thanks for a great product and certainly to feel free to use me for a reference if needed." (Lane J. Kinney, Wildlife Officer)
- "I wish to thank you for your fantastic Scent-Lok Clothing! . . . One place I really wanted to try the suit at was an area that had fantastic sign, but the wind would swirl into corner where I placed my stand and it seemed no matter how much cover scent I used (I am very careful with cover scents using only what is right for my area and bagging all my exterior clothes, showering with no scent products and dressing at the site) or which direction the wind came from I never have any luck at hunting this spot. . . . All of a sudden a huge buck walked out of the northeast! I couldn't believe my eyes he could not have come in from any worse

of a direction according to the way the wind is blowing. (This is hard to explain with words but I can't see how this mature buck could possibly not smell me from the direction he entered the field.) He was only ten yards away and all I could do was pull back my bow and shoot . . . I sincerely believe that without your suit I would never have shot this buck." (Kurt Pesch)

- "I have always been very aware of wind direction and trying to keep my scent to a minimum. Hunting for over 20 years I have experimented with many different techniques to help eliminate human scent without having the success I have been looking for. Speaking to many outfitters in Ontario and Manitoba they are absolutely convinced that your Scent-Lok suits work. The success they are having now compared to before without the Scent-Lok suits is amazing." (Kenn Dandeneau)
- "Just wanted to send a note of thanks out to you . . . In the 25 years that I have been hunting, I have never had a deer come in so close to me, unaware of my presence, and I truly believe that it is because of your product. I must have seen 50 different deer this last year and not one of them showed signs that they detected my scent. From 7 to 80 yards away they never looked up once. . . . Thanks again for your terrific product. I will never go in the woods without it again." (Jim Opdyke)

All the testimonials quoted above and numerous other unsolicited testimonials are included as Exhibit H to the Paquin Declaration (Attachment 8).

In addition to these unsolicited testimonials, Applicant has submitted Declarations from many other individuals who attest to astounding, unexpected results realized when utilizing products manufactured by ALS according to the instructions of use. These declarations also discuss the relative success experienced with prior art attempts at avoiding detection by wildlife [see Etling Declaration (Attachment 3), Clinton Declaration (Attachment 4), Love Declaration

(Attachment 7), Hill Declaration (Attachment 6), Supplemental Hill Declaration (Attachment 10) and Geurink Declaration (Attachment 5)].

d. Skepticism of Experts

MPEP § 716.05 states that expressions of disbelief by experts constitute strong evidence of non-obviousness. Upon Applicant's commercial introduction of its innovations there was a great deal of skepticism in the hunting community regarding the effectiveness of an odor absorbing agent such as activated charcoal integrated into an article of clothing. Examples of such skepticism are found in many of the previously mentioned testimonials along with numerous trade journal articles attached as Exhibits H and J to the Paquin Declaration (Attachment 8). Relevant excerpts of these trade journal articles include the following:

- "You don't have to be very old to remember the first carbon suit that Greg Sesselmann of Scent-Lok introduced in 1992 to usher in a new age of scent control for bow hunters. Even so, it's easy to forget this ever expanding product category had to overcome much skepticism in its early days. But as more bow hunters experimented with Scent-Lok garments and experienced the effectiveness firsthand, the good word spread quickly. This stuff worked!" ("Stifling Human Odor" by Patrick Durkin, *Inside Archery*, August 2003).
- "As promised in my January 3 letter, I'm letting you hear how things have gone for me while field testing your SCENT-LOK products. . . . On two occasions while hunting from a tree stand overlooking multiple trails leading to a water source, I had deer under and around my stand. Despite a constantly switching wind, not once did any of the deer detect my presence -- at one point I had five mule deer (two bucks and a doe with twin fawns) within 15 to 20 yards of my tree. I attribute the fact I remained undetected directly to your odor eliminating clothing. . . . To say I was impressed by the effectiveness of your products is an understatement." (N.R. James, Editor of *Bowhunter* magazine)

- “We have an advantage eliminating our human scent since the company Scent-Lok pioneered the odor eliminating clothing technology back in 1992 with their original Scent-Lok liner which you wear under your favorite camo. This technology quickly gained acceptance among savvy big game hunters. When they simplified things by incorporating their product into camouflage outerwear, the response was overwhelming. It has taken the industry by storm, and now we see this technology incorporated into much of our hunting clothing and lots of our accessories.” (“What About Fooling the Nose” by Dick Scorzatava, *Bear Hunting* magazine, July-Aug. 2003)
- “Greg Sesselmann of Scent-Lok pioneered the use of activated carbon in hunting clothing.” (*Inside Archery*, Sept. 2004)
- “Today, the masking scent market has dwindled as human scent control shifted from a cover up strategy to scent containment tactics. In my book, the vision cast by Greg Sesselmann utilizing activated carbon to give us Scent Lok odor control clothing is the future. Skeptical at first of all the talk about molecular levels, scent absorption and anti-microbial fabrics, I’ve become increasingly convinced that scent containment clothing is as important to my hunting equipment as my most trusted Hoyt bow and reliable Easton arrows.” (“Reflections” by Jim Dougherty, *Inside Archery*, Sept. 2004)

The statements listed above are all published in recognized hunting magazines by respected independent authors and commentators in the field and these articles provide clear and objective evidence confirming the skepticism prevalent in the hunting industry regarding Applicant’s innovations.

2. Specific Claim Rejections.

Claims 14 and 16 are not obvious in light of the alleged combination of Blucher and Moyer because each of these claims specifically describes the activated charcoal as being “impregnated into the base layer” of the article of clothing. The combined teachings of Blucher and Moyer fail to teach any means for impregnating an odor adsorbing agent into an article of clothing.

B. Obviousness Rejection – Blucher, Moyer and Slagle

Claims 6, 19, 37, 53, 64-66, 77 and 90 have been rejected under 35 USC § 103(a) as being obvious in light of the combined teachings of Blucher and Moyer in combination with US Pat. No. 5445863 to Slagle. This rejection and the combination of references on which the rejection is made are respectfully traversed.

Rejection of claims 6, 19, 37, 53, 64-66, 77 and 90 in light of the combined teachings of Blucher, Moyer and Slagle is improper because Slagle is not prior art against the present application. Slagle’s filing date is May 3, 1994 whereas the current Application asserts priority back to November 25, 1991. Slagle is not prior art under 35 USC § 102 and therefore a rejection based upon this reference under 35 USC § 103 is improper.

C. Anticipation Rejection – Blucher

Claims 44-46 and 54-58 have been rejected under 35 USC § 102(b) as being anticipated by Blucher. These rejections are moot in view of the fact that claims 44-46 and 54-58 have been cancelled.

D. Double Patenting

Finally, claims 1-98 have been rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over Claims 1-27 of U.S. Patent No. 6,134,718; claims 1-

21 of U.S. Patent No. 6,009,559; claims 1-21 of U.S. Patent No. 5,790,987; claims 1-6 of U.S. Patent No. 5,539,930; and claims 1-12 of U.S. Patent No. 5, 383,236.

The Applicant requests that the double patenting rejections be held in abeyance until allowable independent claims are indicated by the Examiner in the present Application (since a timely filed terminal disclaimer would overcome the rejection such that further consideration of the claims on that rejection should not be necessary). 37 C.F.R. § 1.111(b).

E. Supplemental IDS

Applicant is currently involved in an *Ex Parte* Reexamination of one of patents in the family tree of the present Application. This Reexamination, Ser. No. 90/007,331, has generated hundreds of pages of documentation such as prior art, office actions, amendments, arguments and supporting evidence. Applicant's counsel contacted the Examiner in charge of the present Application on December 22, 2009 to discuss the most appropriate manner in which to bring this potentially relevant information to the attention of the Examiner. The Examiner indicated that she was familiar with this Reexamination and therefore Applicant was requested not to submit copies of all the various office actions, amendments, arguments and supporting evidence. Instead Applicant was requested to submit copies of the patent documents and printed publications which formed the basis of the current claim rejections.

Submitted simultaneously with this Amendment and Reply is a Supplemental Information Disclosure Statement (along with supporting documentation) including the patent documents and printed publications which form the basis of the current claim rejections in Reexamination Ser. No. 90/007,331. Applicant invites the Examiner to review the other documents filed in that case including prior art, office actions, amendments, arguments and supporting evidence.

CONCLUSION

Favorable reconsideration of the application as amended is respectfully requested. The Examiner is invited to contact the undersigned by telephone if it is felt that a telephone interview would advance the prosecution of the present application.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No 19-0741. Should no proper payment be enclosed herewith, as by the credit card payment instructions in EFS-Web being incorrect or absent, resulting in a rejected or incorrect credit card transaction, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741. If any extensions of time are needed for timely acceptance of papers submitted herewith, Applicant hereby petitions for such extension under 37 C.F.R. §1.136 and authorizes payment of any such extensions fees to Deposit Account No. 19-0741.

Respectfully submitted,

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